Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services	)	WC Docket No. 03-133
	)	
	)	
Regulation of Prepaid Calling Card Services	)	WC Docket No. 05-68

COMMENTS OF MCI INC.

MCI, Inc. ("MCI") agrees with the Commission that its "piecemeal" approach to the appropriate regulatory classification of enhanced prepaid cards has led to great regulatory uncertainty. *See In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Card Services,* WC Docket No. 03-133 ("NPRM") ¶ 38. This regulatory uncertainty has resulted in different providers operating with different cost structures, based on their best guesses as to how the Commission ultimately will address this underlying regulatory uncertainty. A regulatory regime that leaves the regulated parties guessing, and where competitive advantage may be based as much on different regulatory assumptions as on different operational efficiencies, badly serves the industry and the public.

Unfortunately, however, the regulatory confusion that is causing this harm is not unique to prepaid calling cards and cannot be resolved in an inquiry concerning only enhanced prepaid services. To the contrary, the uncertainty stems from conflicting statements the Commission has made concerning the Communications Act's definitional terms "telecommunications services" and "information services," and, beyond that, from longstanding confusion about the application

of the Commission's definitions of "basic" and "enhanced" services when they are applied to enhanced service providers who use their own transmission facilities. Until that underlying confusion is addressed, any resolution of the issue as it applies to calling cards will itself be "piecemeal," and subject to revision and challenge as the fundamental regulatory tension is addressed in courts and at the Commission in other proceedings.

Moreover, while the regulatory uncertainty here stems from confusion over these definitional terms, its practical consequences are almost entirely caused by another critical piece of unfinished Commission business -- intercarrier compensation reform. The truth is that providers of prepaid cards would be largely indifferent to whether their services were considered "telecommunications services" or "information services," or interstate or intrastate, were it not for the fact that different intercarrier compensation regimes apply based on these characterizations. This makes no sense. Wildly different intercarrier charges should not apply to services based on artificial regulatory distinctions. Unless and until *that* problem is solved, second- and third- order problems of the type at issue here will continue to plague the Commission's docket.

Because of these larger regulatory problems, this limited proceeding cannot finally resolve the issues the Commission here has raised. The best the Commission can hope to do is to bring a modicum of consistency to this area pending conclusion of the intercarrier compensation proceeding, and the conclusion of the multitude of pending court and Commission proceedings that are addressing the distinction between information services and telecommunications services -- the Supreme Court's pending decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, U.S. Nos. 04-277 and 04-281 ("*Brand X"*) and any subsequent proceeding on remand, the Ninth Circuit's pending decision in *California v. FCC,* Case No. 05-

70007 (9th Cir. 2005) ("*Vonage"*), and any subsequent proceeding on remand, and this Commission's pending proceedings in, *inter alia, In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* WC Docket No. 02-33 ("*Broadband Framework Proceeding"*); *IP-Enabled Services, Notice of Proposed Rulemaking,* WC Docket No. 04-36 ("*IP-Enabled Services NPRM*"); and *In the Matter of Level 3 Communications LLC Petition for Forbearance,* WC Docket No. 03-266 (2004).

Because these other proceedings are of more general significance than this proceeding, it is neither practical nor wise for the Commission to resolve the critical underlying regulatory issues in this proceeding. Instead, the Commission should at most attempt triage while it tends to the larger problems this regulatory chaos has caused. Accordingly, in these Comments, MCI here does not attempt to lay out a framework to address these larger issues, or to address the larger policy concerns that these issues raise. Instead, it proposes a more modest solution that attempts merely to harmonize the Commission's most recent statements on these matters, and to describe the implications of these statements to prepaid services. We do not consider whether the rule that results is the most sound as it would apply in the many contexts in which this question arises. Those considerations should be addressed in the Commission's other dockets (to the extent they are not definitively resolved by reviewing courts).

Within these constraints, in what follows, MCI first describes its own enhanced prepaid card product, which is similar to a variant of the AT&T enhanced card the Commission is considering in this NPRM. Next, we describe the Commission's most recent pronouncements in this area, which concludes that services that are not "pure" transmission services are considered information services. Finally, MCI demonstrates that prepaid services that offer customers the capability to access information should be considered information services for all purposes. That

rule best aligns with the Commission's broadly deregulatory agenda in this area, which the Commission has applied to these statutory definitions most recently in considering the regulatory status of Internet access services. The Commission should draw such a bright line rule (at least for the time being), because any case-by-case rule of the type suggested by the NPRM, based on the percentage of a customer's use of the enhanced functionality, or the degree to which the provider advertises the enhancement, or some other consideration, would only perpetuate the uncertainty which the Commission wishes to minimize.

I. MCI's Enhanced Calling Card Product

MCI's "Golden Retriever" prepaid calling card gives customers the capability of dialing an enhanced platform, at which time they may reach an operator who provides them with a menu of enhanced services, such as sports scores, weather reports, hotel reservations and the like.[1] When the customer accesses the service using her card, she hears the following message:

> Let MCI be your gateway to the information you need, when you need it, whether it's on the go or from your home or office. Traffic updates, driving directions, time of day, movie times, local information and even more are now at your fingertips. $1.25/20 units will be deducted from your card when you use this service. To access Golden Retriever from MCI press 1 now. To return to the main menu, press the star key.

At that point, the customer may either access the information service functionality, or press the star key, return to the main menu and make a telephone call. MCI's card has integrated transmission and enhanced capabilities together, and is marketed as an integrated product offering. In relevant respects, then, this card is similar to the first variant to AT&T's enhanced platform card described in the NPRM. ¶ 38.

[1] January 27, 2005 ex parte letter from Larry Fenster to Marlene Dortch in WC Docket No. 03-133 (attachment). Specifically, the MCI card allows customers to obtain the following information services: directory information; time of day, reverse directory assistance, category search, hotel and restaurant guide, weather forecasts, driving directions, general city events, movie event and theatre information, stock quotes, sports scores and schedules and horoscope.

II. The Regulatory Framework

There is no dispute that the enhanced capabilities offered through cards such as MCI's "Golden Retriever" constitute "information services." They offer the user "a capability for . . . acquiring, . . . retrieving, utilizing or making available information via telecommunications." 47 U.S.C. § 153(20). Equally, there is no dispute that, viewed in isolation, when the card is used to complete a call to a called party, rather than to access information services, that constitutes "telecommunications," which is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). The question raised by this NPRM, then, is how to characterize this "hybrid" or "mixed" service.

The Commission's most recent rulings on this question are its *Cable Unbundling Order* and *Broadband Framework NPRM*. For consistency's sake the FCC's ruling here should be consistent with these other recent rulings.[2] In both of these proceedings, the Commission started with a conclusion it had first reached in its *Federal-State Joint Board on Universal Service,* Report to Congress, 13 F.C.C.R. 11501 (1998) (*"Report to Congress"*). There the Commission concluded that an "integrated" service that includes both transmission and enhanced functionality must be considered for all purposes exclusively an information service. The Commission reasoned that all information services by definition contain "telecommunications." Since Congress, however, did not state that information services contained "telecommunications

[2] MCI does not agree with several aspects of the Commission's current understanding of these statutory definitions, and has urged the Supreme Court to affirm the Ninth Circuit decision reversing the *Cable Unbundling Order*. If the Supreme Court affirms the Ninth Circuit decision, the Commission must follow the Supreme Court's holding in this closely related proceeding. In that event, the Commission should call for further comments in this proceeding to address the Supreme Court decision. Given how closely the two proceedings are related, the Commission also might consider refraining from any final action here until the Supreme Court has rendered its decision.

services," the FCC reasoned that the transmission component of information services are not themselves telecommunications services. Instead, the Commission determined that information service providers use telecommunications as an input to their information services, rather than offer that input itself directly to the public. In that sense, in the Commission's view, the terms "information services" and "telecommunications services" are mutually exclusive -- a service can be one or the other, but it cannot be both. *Report to Congress, id.* ¶ 39; s*ee also id.* ¶¶ 43, 59. As the Commission concluded, "hybrid services are information services, and are not telecommunications services." *Id.* ¶ 57. Only "pure transmission" services are telecommunications services. *Id.* ¶ 59.

On the other hand, the Commission consistently has acknowledged that a provider might choose to offer two distinct services, one an information service, and one a telecommunications service. Here too the Commission relied on its *Report to Congress,* where it stated that when a provider offers a "mixed" or "hybrid" service it is to be considered entirely an information service, unless the provider chooses on its own to offer "two distinct services" to the public. *Id.* ¶¶ 59-60. In considering whether hybrid services are an integrated information service, or instead two discreet services, the Commission has looked to way the provider offers the service to the public. It has done so because the statute defines the service based on what the provider chooses to "offer[]." Thus, in the *Cable Unbundling Order,* the Commission found dispositive the manner in which the service is "currently provisioned." *Cable Unbundling Order* ¶ 38. *See also id.* ¶ 34 (quoting 47 U.S.C. §§ 153(46),(43)).

In reaching this conclusion, the Commission considered, and rejected, the view that the characterization should turn in any way on whether the customer makes any use of the enhanced capabilities offered. It reasoned that under the statute all that is required is that the information

functionalities are "offered" as a "capability." Because a customer's "choice not to utilize certain capabilities does not eliminate that capability or change the underlying character of the service offering," *Brand X,* Reply Brief for the Federal Petitioners, at 4, in the Commission's view customer usage is an irrelevant consideration.

Taking these considerations together, in the Commission's current view the *only* service that is properly characterized as a "telecommunications service" is a "pure transmission service," *Report to Congress* ¶ 73, that is, a service offered to the public without the capability of accessing any information service features.

The Commission believes this is a sound view of the Act, since it harmonizes the definition of "telecommunications service" with the statutory and common law treatment of "common carriage," terms which are meant to be largely synonymous. In the Commission's view, both under the Act and the common law, a provider is subject to common carrier obligations (or, in the Act's terms, a carrier is providing a "telecommunications service") only in one of two situations. First, a carrier may choose on its own to offer a pure transmission service and hold itself out to the public as a common carrier. Second, the Commission may require a provider to separately offer its transmission services, as it did in the *Computer Inquiry* cases.[3] *See, e.g., In re Cable & Wireless, PLC,* 12 F.C.C.R. 8516, ¶¶ 14-15 (1997); *Virgin Islands Tel. Corp. v. FCC,* 198 F.3d 921, 925-26 (D.C. Cir. 1999). Thus, in the Commission's view, when a provider has chosen to offer integrated information and telecommunications functionality, it is *not* offering a pure transmission service and is not providing a "telecommunications service," unless the Commission chooses to require it to unbundle the telecommunications component.

[3] *See Amendment of Section 64.702 of the Commission's Rules and Regulations,* CC Docket No. 20828, Final Decision, 77 F.C.C.2d 384 (1980) ("*Computer II*), *recon.,* 84 F.C.C.2d 50 (1980), *further recon.,* 88 F.C.C.2d 512 (1981), *aff'd sub nom.*, *Computer and Communications Indus. Ass'n v FCC,* 693 F.2d 198 (D.C. Cir. 1982).

The Commission articulated and then applied this understanding of the statutory definitions in the *Cable Unbundling Order.* It found that cable modem service is made up of both telecommunications features -- transmission to and from sites on the Internet -- and information service features, such as offering to the user the ability to make a web page or to have an e-mail account with the ISP. ¶ 36. The Commission did not dispute that consumers purchase the service for its transmission features. But it found it irrelevant that some users never take advantage of enhanced features such as email accounts or web page creation -- indeed it never even attempted to quantify the hybrid service was used. It was enough, in the Commission's view, that consumers had the *capability* to access these information service features.

The Commission reached the same conclusions (on a tentative basis) when considering the status of wireline broadband Internet access services in the *Broadband Framework Proceeding.* There too, the Commission found it enough that when the phone companies offer DSL service, they are giving their users "the ability to run a variety of applications that fit under the characteristics stated in the information service definition," ¶ 20, regardless of whether the customer actually chooses to make use of those applications.[4]

Finally, in the *Report to Congress,* and in other decisions, the FCC had suggested a different result might obtain if the information service provider offered services over its own transmission facilities. But in the *Broadband Framework Proceeding* and the *Cable Unbundling Order,* the Commission rejected this suggestion. Instead, it concluded that a hybrid service is an information service even when the provider is using its own common carrier facilities to offer the

[4] Even if the Supreme Court ultimately accepts the FCC's statutory framework in the *Cable Unbundling Order,* in MCI's view there remain important distinctions not at issue here between the regulatory classification of cable modem services and wireline DSL services.

service. *Broadband Framework Proceeding* ¶ 25; *see also Cable Unbundling Order* ¶ 41. The Commissioned concluded this construction followed necessarily from its view that the key to understanding the two definitional provisions was the nature of the service offered to the customer. And, "the fact that the provider owns the transmission does nothing to change the nature of the service to the end user." *Broadband Framework Proceeding* ¶ 25. MCI does not agree with this construction of the statute. Nevertheless, should the Commission's construction be accepted by the courts, it applies with equal force here.

III. The Commission Should Continue to Apply its Bright-Line Rule Adopted in the *Cable Modem Order* and Eschew Case-By-Case Analysis in this Area.

As indicated above, the categorization issues raised by Internet access service provide a close analogy to those raised by an enhanced prepaid card service that offers a choice of enhanced features in addition to a basic transmission service. As the Commission never attempted to parse the extent to which consumers use Internet access services for transmission functions as opposed to information service functions, so too it should not attempt to engage in any such quantification here. It is enough that in in both cases the services offer the "capability" to access the enhanced features, and in both cases the providers choose to offer these bundle of services together to the consumer at one price. And, in both cases, in the Commission's view the contrary argument that there is a separate telecommunications service "rests at bottom on the [false] assumption that an 'offering' of an integrated service or product must necessarily be viewed as the 'offering' of each constituent part as well." FCC Reply Br. in *Brand X* at 2.

In the NPRM, the Commission nevertheless identifies factors that it never considered in the Internet access context, and asks if consideration of those factors might be helpful to resolve this definitional question on a case-by-case basis. *NPRM* ¶ 39. The Commission should decline to adopt such a multi-factor test, and instead adhere to the bright-line rule set out in recent

Commission rulings. Consideration of these factors would be inconsistent with these Commission precedents, and also would undermine the asserted purpose of this proceeding, which is to bring some level of predictability into this area.

For example, inquiry into how "integral" information services are to a service that provides transmission capability would be a standardless inquiry that provides no guidance to the industry: it amounts to little more than saying the Commission will treat services as "integrated" or "distinct" as it sees fit for reasons that are not captured by this "standard."[5] Consideration of the percentage of marketing revenue spent on advertising the enhanced features would be a useless regulatory marker -- presumably once the Commission announces the required percentage, a provider will simply adjust its marketing budgeting accordingly. Customer usage as a standard suffers from the opposite defect. That number is unknown at the time the contractual arrangements for these services are undertaken, and a provider cannot be expected to

[5] Neither is there any plausible claim that the information services offered in cards such as MCI's "Golden Retriever" are *so* integrated with the accompanying telecommunications functions that they can be seen as merely adjunct to this basic function, and for that reason do not constitute information services under either the Commission's "adjunct-to-basic" doctrine or its codification in 47 U.S.C. § 153(20) (services used for management of a telecommunications service). These adjunct-to-basic services "facilitate the provision of basic services without altering their fundamental character." *NATA/Centrex Order*, 3 F.C.C.R. 4385, ¶ 12 (1988). They include such things as validation and screening, *see, e.g.*, *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Report and Order and Request for Supplemental Comment, 7 F.C.C.R. 3528, ¶ 19 (1992); and speed-dialing and call forwarding, *see North Am. Telecomm. Ass'n Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equip.*, ENF 84-2, Memorandum Opinion and Order, 101 F.C.C.2d 349, 359-61,¶¶ 4-28 (1985). Analogously, regarding AT&T's advertisement phone card, the FCC noted that "from the customer's perspective, the advertising message is merely a necessary precondition to placing a telephone call." *NPRM* ¶ 16. In the case of MCI's Golden Retriever service, in contrast, cardholders need not even take advantage of MCI's information services as a prerequisite to making a phone call, and the information services offered evidently are quite distinct from the telecommunications also offered through the card.

make contractual arrangements before it has an understanding of its principal costs -- intercarrier charges.

The Commission last experimented with such a case-by-case test in *Computer 1,* and ultimately abandoned it for the same reason it should decline to adopt it here:

> At the margin, some enhanced services are not dramatically dissimilar from basic services or dramatically different from communications as defined in *Computer Inquiry I.* But any attempt to draw the line at this margin potentially could subject both the enhanced services providers and us to the prospect of literally hundreds of adjudications over the status of individual service offerings. We have noted the danger that such proceedings could lead to unpredictable or inconsistent regulatory definitions. . . . Such proceedings also could consume a very significant proportion of the resources of this agency. The requirement to devote significant resources to try to make individual service distinctions would necessarily reduce the resources available for regulating basic services and ensuring non-discriminatory access to common carrier telecommunications facilities.

Computer II, ¶ 130.

Moreover, consideration of these factors undermines rather than enforces the Commission's stated policy goals. If the Commission were to apply these factors to Internet access services, it would necessarily reach the conclusion that these services include distinct telecommunications service and information service components. Just as in the case of Internet access services, providers of enhanced prepaid card services have chosen to integrate their transmission services with information services.

CONCLUSION

For the foregoing reasons, the Commission should conclude that providers who offer enhanced prepaid calling cards such as MCI's "Golden Retriever" card are offering information services to the public.

Respectfully submitted,

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